No. 73-1197

MICHAEL RODAK, JR.,

In the Supreme Court of the United States

OCTOBER TERM, 1973

RUDOLPH FLANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSTION

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of possessing goods stolen from interstate commerce, knowing the goods to have been stolen, in violation of 18 U.S.C. 659.[1] He was sentenced to imprisonment for one year and was fined $1,000. The court of appeals affirmed (Pet. App. 1a).

1. Petitioner's sole contention is that the evidence was insufficient to show that the goods were in interstate commerce at the time they were stolen. As he acknowledges (Pet. 3), however, this contention was not made

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[1]The indictment charged that petitioner unlawfully possessed a quantity of beef worth in excess of $100. The maximum penalty for that offense is a fine of $5,000 and imprisonment for 10 years. Petitioner was convicted, however, of the lesser included offense of unlawfully possessing goods worth $100 or less, for which the maximum penalty is a fine of $1,000 and imprisonment for one year.

in the court of appeals. "Only in exceptional cases will this Court review a question not raised in the court below" (*Lawn* v. *United States*, 355 U.S. 339, 362, n. 16). Petitioner has shown no such exceptional circumstances in this case.

He asserts, however, that "the issue presented in this petition raises a question of jurisdiction and therefore should be considered" (Pet. 3). His theory, presumably, is that no federal offense was committed if the goods were stolen after they had lost their interstate character. But the test of jurisdiction is whether the indictment charges a federal offense, not whether the evidence proves it beyond a reasonable doubt. *E.g.*, *United States* v. *Perea*, 413 F. 2d 65, 67 (C.A. 10), certiorari denied, 387 U.S. 945. The indictment in this case charged that petitioner possessed goods "which had been embezzled and stolen while [they] * * * were moving as, were a part of, and constituted an interstate shipment" (C.A. App. 1).[2]

Since the indictment properly charged an offense under 18 U.S.C. 659, the district court had subject matter jurisdiction. Petitioner's contention that the proof did not establish an essential element of the offense relates only to the sufficiency of the evidence, not to the district court's jurisdiction over the case. This Court therefore need not consider the contention raised for the first time in the petition for a writ of certiorari.

2. The contention is, in any event, without merit. The evidence showed that the George A. Hormel Company

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[2]"C.A. App." refers to the appendix filed in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

shipped 527 boxes of meat from Fremont, Nebraska, to Alterman Foods, Inc., in Atlanta, Georgia (C.A. App. 9-10, 17). Bobby Lee Reec, driving a tractor leased to Alterman, picked up the trailerload of meat at the Hormel plant in Nebraska and drove it to a truck stop in Atlanta. He arrived at the truck stop at about 2:00 A.M. on April 1, 1972 (*id.* at 32-37, 46-48).

At about 10:00 A.M. that day, Reec transferred the truck keys and the bills of lading to Byron Moseley, the regular driver for whom Reec was substituting (*id.* at 37, 43, 47, 53-54). At the time of the transfer, the seal was still intact on the trailer (*id.* at 37). Mosely intended to drive the tractor-trailer to the Alterman warehouse the following morning (*id.* at 55). The tractor-trailer was stolen from the truck stop during the afternoon of April 1, 1972 (*id.* at 43-45, 49).

The shipment had not yet completed its interstate journey at the time it was stolen. Though it had arrived in Georgia, it had not reached its final destination, the Alterman warehouse, and the seal on the trailer had not yet been broken. In these circumstances, the jury properly found that the shipment was in interstate commerce at the time of the theft. *United States* v. *Astolas*, 487 F. 2d 275 (C.A. 2), certiorari denied April 22, 1974, Nos. 73-1057 and 73-1058; *United States* v. *Cousins*, 427 F. 2d 382 (C.A. 9); *Chapman* v. *United States*, 151 F. 2d 740 (C.A. 8).[3]

It does not matter whether "the consignee * * * and the carrier were one in [*sic*] the same" (Pet. 5). "It is settled law * * * that carriage of the property

[3] *O'Kelley* v. *United States*, 116 F. 2d 966 (C.A. 8), relied on by petitioner (Pet. 5), is inapposite. In *O'Kelley* the goods in question had already been delivered to the consignee and the seal on the railroad car had been broken before the theft occurred.

by the owner does not put the property outside of the protection of Section 659" (*United States* v. *Astolas, supra,* 487 F. 2d at 280). The same standards for determining whether a shipment is in interstate commerce "appl[y] whether or not a separate common or contract carrier is involved" (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

DOJ-1974-04